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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

KARUK TRIBE OF CALIFORNIA and LEAF HILLMAN,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF FISH AND GAME; and RYAN BRODDRICK, Director, California Department of Fish and Game,

Defendants.

Case No. 05211597

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE OBJECTIONS OF THE NEW 49'ERS, INC., AND RAYMOND W. KOONS TO THE PROPOSED STIPULATED JUDGMENT

Date: January 26, 2006
Time: 9:00 a.m.
Dept: 512 (Hayward)

The Honorable Bonnie Sabraw
Trial Date:
Action Filed: May 6, 2005

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INTRODUCTION

The California Department of Fish and Game and Ryan Broddrick (Department) respectfully urge the Court to exercise its discretion and enter the Proposed Stipulated Judgment. The Stipulated Judgment embodies a negotiated settlement agreement between the Department and Plaintiffs, The Karuk Tribe and Leaf Hillman (Tribe). That settlement will benefit and conserve Coho salmon, a species protected under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), among other special status species, a point that The New 49'ers, Inc., and Raymond W. Koons (49ers), do not contest.

Rather, the 49ers argue that the settlement is contrary to law and policy. According to the 49ers, the "fundamental problem" with the agreed upon closures and seasonal restrictions on suction dredging in the settlement is that they "could not lawfully be attained by the Department under any of the pertinent statutory authorities." (49ers' Objections, p. 2:10-12.) Their argument ignores, however, the Department's lawful exercise of discretion as a lead and trustee agency in litigation brought by the Tribe under the California Environmental Quality Act. (Pub. Resources Code, § 21000 et seq.)

Likewise, the 49ers contend the Stipulated Judgment constitutes an improper regulation by "private agreement." (See, e.g., 49ers' Objections, p. 2:19-20.) This argument, however, misrepresents the underlying settlement between the Department and Tribe. The closures and seasonal restrictions embodied by the settlement are nothing more than interim injunctive relief pending completion of a formal rulemaking action by the Department under the Administrative Procedures Act (APA) (Gov. Code, § 11340 et seq.) and related environmental review under CEQA. In fact, nothing in the Stipulated Judgment requires the Department to adopt the interim measures as regulations under the APA. Likewise, nothing in the settlement compels the Department to exercise its discretion or independent judgment in any particular fashion under CEQA or the APA in the future.

In short, the 49ers simply aren't happy with the environmental protections afforded by the settlement. Those policy objections, however, do not mean the Stipulated Judgment violates law or that it is contrary to public policy. In fact, the opposite is true, and the Department

respectfully urges the Court to enter judgment as proposed.

BACKGROUND

Fish and Game Code sections 5653 through 5653.9 govern suction dredging in all waters of the state. In 1994, the Department promulgated regulations that implement those code sections. (See Cal. Code Regs., tit. 14, §§ 228, 228.5.) In doing so, the Department prepared and certified an environmental impact report (EIR) in accordance with CEQA that described the significant adverse effects on the environment associated with suction dredging. In the EIR, the Department found, for example, that suction dredging "can potentially affect fish and fish habitat", that "the effects . . . on fish eggs and yolk sac fry can be significantly adverse," and that dredging can adversely affect fish reproduction. (Department's Request for Judicial Notice [RJN], at 3, 4, 49-52) The affected fish species include those that are the subject of the Tribe's lawsuit against the Department.

As the Department stated in the EIR, the suction dredging regulations "provide for suction dredge mining in designated waters of the State while protecting fish and wildlife resources." (RJN, Exh. A, at 2; see also Cal. Code Regs., tit. 14, § 228 *et seq.*; see also Manji Declaration, ¶ 3.) The measures taken to reduce potential impacts to less than significant include the general requirements and prohibitions in section 228 of the Department's suction dredging regulations, as well as the seasonal restrictions and closures listed in section 228.5, that apply to all suction dredge permittees. (Cal. Code Regs., tit. 14, § 228 *et seq.*) The EIR belies the 49ers' contention that there is no evidence of significant environmental impacts associated with suction dredging. In fact, they never challenged the EIR, and are not disputing the findings the Department made in the EIR regarding those impacts and the measures necessary to reduce those impacts to less than significant.

PROCEDURAL HISTORY

The Karuk filed the underlying complaint on May 6, 2005. Defendants answered on July 22, 2005. A Notice of Settlement Meeting pursuant to CEQA was filed on June 30, 2005, and the initial settlement meeting was held on July 13, 2005. While initially the parties were preparing the case for litigation on the merits, and a briefing schedule and hearing date were

established, subsequent extensive conversations between the Karuk and the Department laid the groundwork for a settlement. Ultimately, both parties reached a compromise reflected by the Joint Stipulation and Stipulated Judgment before the Court. The Joint Stipulation was executed by the Department on November 30, 2005, at which time it took effect. Both the Joint Stipulation and Stipulated Judgment were submitted to this Court on December 7, 2005.

ARGUMENT

I. THE COURT SHOULD EXERCISE ITS DISCRETION, AND ENTER THE STIPULATED JUDGMENT.

Code of Civil Procedure, section 664.6 provides:

> If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

(Code Civ. Proc., § 664.6.) "A stipulated judgment is indeed a judgment; entry thereof is a judicial act that a court has discretion to perform." (*California State Automobile Ass'n Inter-Insurance Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) Moreover, settlement agreements are "highly favored" and "[g]enerally, when parties decide to eliminate the risks of further litigation by stipulated agreement, . . . the courts should respect the parties' choice and assist them in settlement." (*Plaza Hollister, supra*, 72 Cal.App.4th at 12.)

A stipulated judgment is considered "in the nature of a contract subject to interpretation and construction." (*Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, 471.) Pursuant to Code of Civil Procedure, section 664.6, the trial court sits as the trier of fact to determine whether the parties have entered into a valid and binding settlement. (*Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1533.) To that end, a court may reject a stipulated judgment where the "stipulation is contrary to public policy [citation] or...incorporates an erroneous rule of law." (*California State Automobile Ass'n, supra*, 50 Cal.3d at 665; see also, *Plaza Hollister Limited Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 12.) The Stipulated Judgment in the present case is neither, however, and the Court should enter judgment

as requested.

A. The Stipulated Judgment Is Consistent With Law.

The central tenet of the 49ers argument is that the Department "promulgated regulations by private agreement." (49ers' Objs., p. 2:21-22.) According to the 49ers, the "fundamental problem" with the agreed upon seasonal restrictions and closures is that they "could not lawfully be attained by the Department under any of the pertinent statutory authorities." (Id., p. 2:10-11.) To reach this conclusion, the 49ers mischaracterize the Stipulated Judgment, and ignore the Department's lawful exercise of discretion as a lead and trustee agency under CEQA in the midst of a CEQA lawsuit.

1. The Department Properly Settled the Present Action by Agreeing to Interim Injunctive Relief Under CEQA That Will Avoid or Substantially Lessen Alleged Significant Impacts on Coho Salmon and Other Species of Special Concern.

Distilled to its essence, the Tribe's CEQA challenge is based on claims that suction dredging in the Klamath, Scott and Salmon Rivers results in new significant or substantially more severe environmental impacts than previously disclosed by the Department in the 1994 EIR. They contend, then, that because the issuance of suction dredge permits is a discretionary action subject to CEQA, the Department must mitigate those impacts consistent with the 1994 EIR, or conduct subsequent or supplemental environmental review. Rather than litigate the merits of the Tribe's arguments, however, the Department pursued and ultimately agreed to settle the case without any admission of liability.[1/]

Contrary to the 49ers' claims, the seasonal restrictions and closures embodied by the Joint Stipulation and Stipulated Judgment are not regulations, nor do they bind the Department to specific prohibitions on suction dredging. Instead, the restrictions and closures serve as avoidance and mitigation measures agreed to by the Department under CEQA to address allegations related to significant, adverse environmental impacts. (See generally, Manji

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1. The decision to settle the case is clearly within the Department's discretion to marshal its limited resources as it deems appropriate. (See *Heckler v. Chaney* (1985) 470 U.S. 821, 831 ["an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."].)

Declaration, ¶¶ 4, 5, 7, 8, 10-13.) Indeed, at most, the closures and seasonal restrictions are narrowly tailored injunctive relief pending completion of a formal rulemaking action by the Department under the APA and related review under CEQA. Despite the 49ers' claims, nothing in the Stipulated Judgment requires the Department to adopt the interim closures and seasonal restrictions as regulations under the APA. Likewise, nothing in the Stipulated Judgment compels the Department to exercise its discretion and independent judgment under CEQA or the APA in any particular manner at some point in the future. Finally, nothing forecloses any party's participation in any future rulemaking.

The Stipulated Judgment, in this respect, is entirely consistent with the statutory direction in CEQA urging the judiciary to favor narrow and appropriate, but environmentally protective remedies. CEQA provides, for example, that any court order "shall include only those mandates which are necessary to achieve compliance with [the Act]" and that any such order should only address "those specific activities in noncompliance" with CEQA. (Pub. Resources Code, 21168.9, subd. (b).) The same section also provides, in pertinent part, that any

> "order shall be limited to that portion of a determination, finding, or decision or specific project activity or activities found to be in noncompliance only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with [CEQA], and (3) the court has not found the remainder of the project to be in noncompliance with [CEQA]."

(*Ibid.*)

The Department respectfully submits that the Court should view the interim closures and seasonal restrictions in accord with these CEQA provisions. The interim measures are narrowly crafted to address only the alleged impacts at issue, they will not compromise complete and full compliance with CEQA in connection with a future rulemaking action, and there is nothing to suggest the Department's suction dredging permitting program is out of compliance with CEQA. The argument by the 49ers begs the question if CEQA authorizes the Court to fashion a remedy in the present action that includes interim relief similar to or identical to the closures and seasonal restrictions at issue, why is a stipulated judgment to the same effect to be precluded?

2. The Interim Closures and Seasonal Restrictions Are Consistent With Legal Mandates Governing the Department's Obligations as a Lead and Trustee Agency Under CEQA.

Every State and local public agency in California is subject to CEQA's "substantive mandate." That mandate, as recognized by the California Supreme Court, requires agencies to mitigate significant effects on the environment to the extent feasible. "Under CEQA, *a public agency must* . . . consider measures that might mitigate a project's adverse environmental impact, and *adopt them* if feasible." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 123, 134, [citing Pub. Resources Code, §§ 21002, 21081]; emphasis added; see also *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233 ["CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives"]; *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41 ["CEQA contains substantive provisions with which agencies must comply. The most important of these is the provision requiring public agencies to deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects."].)

CEQA's substantive mandate takes on added significance for the Department as the State's trustee for fish and wildlife resources. (See generally Cal. Code Regs., tit. 14, § 15386, subd. (a); Pub. Resources Code, § 21070.) Fish and Game Code section 1802 provides, for example, that the Department "has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species." (Fish & G. Code, § 1802.) In that capacity, the Department is specifically directed to, among other things, "encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state." (*Id.*, § 1801.) That charge, coupled with its obligation to comply with CEQA's substantive mandate, provides the legal basis and authority for the Department's exercise of discretion in the context of the present lawsuit. Any suggestions to the contrary are mistaken.

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3. The Interim Closures and Seasonal Restrictions Are Not "Regulations" Nor Do They Bind the Department to Specific Prohibitions on Suction Dredging.

The 49ers cast the Joint Stipulation as regulations promulgated by private agreement. As argued above, the Department has made no such agreement. The restrictions contained in the settlement are proper interim injunctive relief under CEQA.

In disparaging the settlement, the 49ers pose the type of relief that would be appropriate in their view. Specifically, the 49ers concede that an agreement to the formulation of a specific proposed rule combined with the reservation of authority to adopt the regulation would be acceptable. (49ers' Objs., at 6:20-22; 10, n. 10.) The 49ers construe the case law and the Department's discretion too narrowly, however.

The 49ers cite the purportedly "widely-cited dissent" in *Citizens for a Better Environment v. Gorsuch* (1983) 718 F.2d 1117, in support of their contention. In doing so, the 49ers never cite the Court the actual holding in *Gorsuch*. In *Gorsuch*, a group of companies and an industry association intervened in lawsuits brought by environmental groups against the EPA alleging the failure to comply with certain provisions of the Clean Water Act (CWA) regarding the regulation of toxic waste. (*Id.* at 1120.) Industry challenged a settlement agreement between the environmental groups and EPA in which EPA agreed to a "detailed program for developing regulations to deal with the discharge of toxic pollutants", alleging that this infringed upon the EPA Administrators' discretion under the CWA. (*Id.* at 1120-21.) The D.C. Circuit rejected this argument holding that the settlement agreement does not "impermissibly infringe" on EPA's discretion; this despite EPA's concession that the agreement did infringe on its discretion to a limited extent. (*Id.* at 1130, 1127.) A critical factor in the court's decision was that any infringement was done "with EPA's consent". (*Id.* at 1128.) In reaching this conclusion, the court also rejected the argument that the district court acted beyond its authority because portions of the agreement went beyond the statutory requirements of the CWA. The court established that "the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve." (*Id.* at 1125.) In the case of the CWA, the proper analysis was "that it was 'consistent with Congress' intent that water pollution be curbed." (*Id.*)

While the relief agreed upon by the Department is not the same as that agreed to by EPA in *Gorsuch*, there are many parallels that can be drawn from that case. As mentioned previously, the restrictions on suction dredging in the stipulated judgment, at most, constitute limited injunctive relief pending completion of a formal rulemaking action by the Department. Similar to the EPA in *Gorsuch*, the Department exercised its discretion to agree to interim relief that in its judgment constitutes mitigation measures under CEQA to address the allegations in the Tribe's Complaint of additional environmental impacts. This interim relief is consistent with the Legislature's intent in CEQA that the environment be protected where feasible, as well as with the Department's role as trustee of fish resources. (See Section B., *infra*.) Thus, the Stipulated Judgment is consistent with "the purposes which the statute[s] [are] intended to serve." (*Gorsuch, supra*, 718 F.2d at 1125.)

Moreover, the Department's action in entering into this settlement is supported by the California Supreme Court's decision in *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781. There, in the context of regulatory rate-setting, the PUC was allowed to enter a stipulated judgment, while deliberating in closed session, that set rates to which TURN (a nonprofit group) later objected. (*Id.* at 798-805.) The Court analyzed the Bagley-Keene and Brown Acts and found that a public agency, even in a regulatory context, must be allowed to enter into a settlement in closed session. (*Id.*) This underscores the Department's ability to do the same here, particularly since it is not subject to the public notice provisions of those acts.

Additionally, stipulated judgments are by their very nature contracts. (*Pardee Construction Co., supra*, 37 Cal.3d at 471.) The Department can bind itself contractually to any number of obligations that it might not otherwise have under statute, as long as consistent with the purposes of the statute. Here, binding itself to a particular form of injunctive relief while reserving its full authority in any future rulemaking, is a proper exercise of the Department's discretion to contract; particularly in light of its dual roles as trustee of the resource and lead agency under CEQA. (See *Pardee, supra*, 37 Cal.3d at 468-73; see also *Stephens v. City of Vista* (1993) 994 F.2d 650, 655-56.)

Finally, the regulations contemplated by Fish and Game Code section 5653 are

couched entirely in terms of suction dredge activities that will not be "deleterious to fish." (Fish & G. Code, § 5653, subd. (b).) Faced with allegations that the suction dredge permitting program is resulting in impacts under CEQA that are deleterious to fish, certainly the Department could agree to interim relief to address those alleged effects pending a formal rulemaking action. To rule otherwise, of course, would sweep aside underlying statutory intent, CEQA's substantive mandate, and the Department's charge as California's trustee agency for fish and wildlife.

4. The 49ers Seek an Alternative Remedy That Exceeds the Court's Authority.

The flaw in the 49ers' logic is highlighted by a request for relief from the Court. According to the 49ers, "a simple command to the Department to initiate rulemaking proceedings to address such issues as the Department and Tribe agree merit renewed consideration would avoid all [the complained of] vices" brought on by the Stipulated Judgment. (49ers' Objs., at 12:10-12.) Yet, a judicial mandate to the Department that it initiate a rulemaking action is beyond the scope of the Court's authority. (See Pub. Resources Code, 21167.9, subd. (c).) In contrast, entering judgment as proposed is not. (See generally, Code Civ. Proc., § 664.6; Pub. Resources Code, § 21168.9, subds. (a), (b).)

B. The Settlement Effectuates Important Public Policy.

As discussed above, the settlement agreed to by the Department provides additional protection for Coho salmon and other species of special concern. (See generally, Manji Declaration, ¶¶ 4, 5, 7, 8, 10-13.) The conservation of fish and fish habitat, as well as the maintenance "biologically sustainable populations" are clearly expressed policies of the state. (Fish & G. Code, §§ 1801, 1700.) Moreover, the policies underlying CEQA encourage the protection of the environment of California. (Pub. Resources Code, §§ 21000, 21001.) The 49ers have not demonstrated, and they cannot, that the additional protection of Coho and other species afforded by the settlement is against public policy. Indeed, the opposite conclusion is inescapable.

The Department believes the Joint Stipulation and Stipulated Judgment are an appropriate expression of both the Department's and this Court's authority to resolve CEQA disputes, and will result in additional, scientifically sound protection of the resource. (Manji

Declaration, ¶¶ 6, 9, 10-13.) The 49ers have not overcome the strong presumption in favor of settlement by demonstrating that the stipulated judgment is contrary to public policy or incorporates an erroneous rule of law. Accordingly, the settlement is valid and binding and the stipulated judgment should be entered.

CONCLUSION

The 49ers real interest here is to scuttle a settlement negotiated in good faith and consistent with the Department's trust responsibility. Because the 49ers attempt to unlawfully impede the proper exercise of authority by the Department under CEQA and in fulfilling its trust responsibility to protect fish resources, and cannot demonstrate that the stipulated judgment is inconsistent with the Department's authority, the Department respectfully requests that the stipulated judgment be entered.

Dated: January 20, 2006

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL and FAX

Case Name: *Karuk Tribe of California and Leaf Hillman v. California Department of Fish and Game, et al.* No.: 05 211597

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 20, 2006, I served the attached

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE OBJECTIONS OF THE NEW 49'ERS, INC., AND RAYMOND W. KOONS TO THE PROPOSED STIPULATED JUDGMENT

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102-7004, addressed as follows:

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Additionally, I served a true copy by facsimile machine, pursuant to California Rules of Court, rule 2008, in our facsimile machine at (415) 703-5480 and faxed the documents to ((510) 835-9849, (415) 981-4343, and (510) 208-4562. The facsimile machine I used complied with Rule 2008, and no error was reported by the machine. Pursuant to Rule 2008, subdivision (e)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 20, 2006, at San Francisco, California.

Elza Moreira
Declarant

Signature